

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Patricia Connor, Individually and on behalf of all those similarly situated,

Plaintiff,

V.

JPMorgan Chase Bank, N.A., et al..

Defendants.

Case No.: 3:10-cv-1284-GPC-BGS

**ORDER GRANTING PLAINTIFF'S
MOTION FOR A SECOND
DISTRIBUTION TO CLASS
MEMBERS AND CY PRES
DISTRIBUTION FROM THE
RESIDUAL SETTLEMENT FUND**

[ECF No. 166.]

Before the Court is Plaintiff Patricia Connor’s Motion for a Second Distribution to Class Members and *Cy Pres* Distribution from the Residual Settlement Fund. ECF No. 166. Defendant JPMorgan Chase Bank, N.A. has filed a response noting that it does not object to the relief requested in Plaintiff’s Motion, and specifically does not oppose Plaintiff’s selection of *cy pres* recipients. ECF No. 169. For the reasons that follow, the Court **GRANTS** Plaintiff’s Motion. The hearing on this matter is hereby **VACATED**.

11

1 **I. Background**

2 On June 16, 2010, Plaintiff filed a putative class action complaint seeking damages
 3 and injunctive relief pursuant to the Telephone Consumer Protection Act (“TCPA”), 47
 4 U.S.C. § 227 et seq. ECF No. 1. On February 15, 2015, the Court issued a Final
 5 Judgment and Order of Dismissal approving of the Settlement Agreement between the
 6 parties. ECF No. 160. The Settlement Agreement provided that each approved claimant
 7 would be issued a settlement check, the amount of which would depend on the number of
 8 claimants. ECF No. 160-1 (“Settlement Agreement”) ¶ 5.01. Plaintiff states that
 9 although checks were issued to all claimants,¹ approximately 12% were not cashed,
 10 leaving a balance of \$924,515.17 in the Settlement Fund from the uncashed checks. ECF
 11 No. 168 (“Perry Decl.”) ¶¶ 2, 3.

12 Plaintiff now moves for the Court’s authorization of a second distribution to the
 13 94,811 claimants who cashed their initial checks. ECF No. 166-1 at 4. Plaintiff
 14 simultaneously moves for authorization of distribution of any unclaimed funds remaining
 15 after the second distribution to two proposed *cy pres* recipients, the Consumer Federation
 16 of America and New Media Rights. *Id.* at 5.

17 **II. Second Distribution**

18 “Most class actions result in some unclaimed funds,” and the Court has “broad
 19 discretionary powers in shaping equitable decrees for distributing unclaimed class action
 20 funds.” *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307 (9th
 21 Cir. 1990). The exercise of this discretion should be guided by the statutory scheme and
 22 the interests of the class members. *See id.*; *see also Lane v. Facebook, Inc.*, 696 F.3d
 23 811, 821 (9th Cir. 2012). Although the terms of a settlement agreement may dictate how
 24 unclaimed settlement funds should be allocated, a district court may otherwise exercise
 25 its equitable powers in managing the distribution of the settlement proceeds. *See Beecher*

27
 28 ¹ Several thousand settlement checks were returned as undeliverable, and the majority of those checks
 were reissued to updated addresses. Perry Decl. ¶ 2.

1 *v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978) (noting equitable powers retained by a court
 2 overseeing distribution of settlement proceeds); *see generally* 4 Newberg on Class
 3 Actions § 12:28 (5th ed.).

4 Here, although the Settlement Agreement indicates that remaining settlement
 5 proceeds be distributed to a *cy pres* recipient,² Plaintiff argues that the parties did not
 6 contemplate a *cy pres* distribution of this size—almost \$1 million—and thus a second
 7 distribution to claimants should be made before a *cy pres* distribution. In the *Malta* case,
 8 the court confronted a similar situation in which the plaintiff filed an unopposed motion
 9 for a second distribution of settlement proceeds. *See Malta v. Fed. Home Loan Mortg.*
 10 *Corp.*, No. 3:10-cv-01290-BEN-NLS, 2017 U.S. Dist. LEXIS 121844 (S.D. Cal. July 31,
 11 2017). The court found that “although the Agreement provides for *cy pres* distribution of
 12 unclaimed funds from the first distribution of the Settlement Fund, it is not clear from the
 13 Agreement that a *cy pres* distribution of this size was contemplated.” *Id.* at *7. The
 14 court, noting that a second distribution would be small but not *de minimis*, authorized a
 15 second distribution to those class members who had cashed the initial settlement checks
 16 despite there being no provision for a second distribution in the settlement agreement. *Id.*
 17 at *7–8.

18 The Court concurs with the reasoning in *Malta*. Like in *Malta*, the Settlement
 19 Agreement’s brief reference to a *cy pres* distribution of remaining funds does not
 20 necessarily suggest that the parties contemplated such a large sum—over 10% of the total
 21 amount intended to be distributed to claimants—be directed towards a *cy pres* recipient
 22 when distribution to claimants remains viable. Defendant’s lack of objection to the
 23 Motion supports this conclusion regarding the parties’ intent. ECF No. 169; *cf. Malta*,
 24 2017 U.S. Dist. LEXIS 121844 at *7 n.3. A second distribution here would also be
 25

27 ² The Settlement Agreement provides: “Any returned checks and un-cashed settlement checks shall be
 28 paid as a *cy pres* award as determined by the Parties and approved by the Court.” Settlement Agreement
 ¶ 11.02.

1 feasible given that the amount remaining in the settlement fund, \$924,515.17, would
 2 cover administrative costs associated with the distribution and result in a *non-de minimis*
 3 distribution of \$8.19 to each claimant who had cashed the initial settlement check.³ *See*
 4 Perry Decl. ¶ 4; *cf. Maxin v. RHG & Co., Inc.*, No. 16-CV-2625 JLS (BLM), 2019 WL
 5 4295325, at *2 (S.D. Cal. June 24, 2019) (finding potential distribution of \$1.89, prior to
 6 deduction of administration costs, *de minimis*); *Malta*, 2017 U.S. Dist. LEXIS 121844 at
 7 *4, 7 (finding payment amount of \$3.07 not *de minimis*).

8 Further, although little case law addresses this precise issue, Ninth Circuit
 9 precedent regarding *cy pres* distributions affirms the Court’s view that a second
 10 distribution to class members, where possible and not contrary to the aims of the
 11 settlement agreement,⁴ is often preferable to a *cy pres* distribution. The *cy pres* (often
 12 translated as “next best”) distribution approach is typically employed when distribution to
 13 individual class members is infeasible, but compensation directed towards a related
 14 institution or non-profit organization would best approximate such benefits to the class.
 15 *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1038 (9th Cir. 2011); *see also* Principles of
 16 the Law of Aggregate Litigation § 3.07(b) (Am. L. Inst. 2010) (“[When funds remain,]
 17 the settlement should presumptively provide for further distributions to participating class
 18 members unless the amounts involved are too small to make individual distributions
 19 economically viable or other specific reasons exist that would make such further
 20 distributions impossible or unfair.”). Accordingly, although the Settlement Agreement
 21 does not expressly contemplate a second distribution to claimants, directing the

22
 23
 24 ³ Plaintiff does not provide a specific explanation for why the Motion proposes to distribute the second
 25 round of checks only to claimants who cashed the initial settlement checks. *See* ECF No. 166-1 at 4;
 26 Perry Decl. ¶ 4. However, like in *Malta*, the Court notes it is not likely that claimants who did not cash
 27 the initial check for approximately \$70 would cash a second check for roughly \$8. *See Malta*, 2017 U.S.
 28 Dist. LEXIS 121844 at *7–8.

29 ⁴ A second distribution might not be appropriate where such a payment would result in a significant
 30 “windfall” to a limited number of claimants to the detriment of class members who did not submit
 31 claims, but that does not appear to be the case here, where the second distribution is only about \$8. *See*
 32 *generally* 4 Newberg on Class Actions § 12:30 (5th ed.).

1 remaining funds towards the claimants would further the settlement's purpose of
 2 compensating claimants for potential violations of the TCPA. *Cf. Hester v. Vision*
 3 *Airlines, Inc.*, No. 2:09-CV-00117-RLH, 2017 WL 4227928, at *2 (D. Nev. Sept. 22,
 4 2017) (finding that a second distribution would "bring the class members closer to [the
 5 full] value of their claims") (internal quotation marks and citations omitted).

6 Thus, the Court GRANTS Plaintiff's Motion for a Second Distribution to Class
 7 Members.

8 **III. *Cy Pres* Distribution**

9 "Cy pres provides a mechanism for distributing unclaimed funds to the next best
 10 class of beneficiaries." *In re Easysaver Rewards Litig.*, 906 F.3d 747, 760 (9th Cir.
 11 2018). Courts have approved *cy pres* where "proof of individual claims would be
 12 burdensome or distribution of damages costly." *Six Mexican Workers*, 904 F.2d at 1305.
 13 A determination of whether an entity is an appropriate recipient of a *cy pres* distribution
 14 must take into account "the nature of the plaintiffs' lawsuit, the objectives of the
 15 underlying statutes, and the interests of the silent class members, including their
 16 geographic diversity." *Nachsin*, 663 F.3d at 1036. In *Nachsin*, the Ninth Circuit held
 17 that the objectives of the Electronic Communications Privacy Act, at issue, had nothing
 18 to do with the *cy pres* donations to Legal Aid Foundation of Los Angeles, the Boys and
 19 Girls Clubs of Santa Monica and Los Angeles, and the Federal Judicial Center
 20 Foundation. *Id.* While the *cy pres* recipient need not be ideal, it must bear "a substantial
 21 nexus to the interests of the class members." *Lane*, 696 F.3d at 821.

22 Here, although Plaintiff cannot calculate precisely the amount of unclaimed funds
 23 that will remain after the second distribution, it is likely to be *de minimis*. The experience
 24 of the first distribution suggests that many, but not all, claimants will cash the second
 25 settlement checks. *See* Perry Decl. ¶ 3. Even if far fewer claimants cash the second
 26 settlement checks due to their lower value, a third distribution would entail yet another
 27 set of administration costs, potentially again exceeding \$100,000. *See id.* (noting that
 28 administrative costs for the second distribution are estimated to be \$147,877.95).

1 Therefore, it is unlikely that following a second distribution there will be more than *de*
 2 *minimis* funds available for a third distribution given the administrative costs associated
 3 with distribution to claimants. It would therefore be burdensome, and contrary to the
 4 language of the Settlement Agreement, to require a third and likely *de minimis*
 5 distribution to claimants before permitting distribution to a *cy pres* recipient.

6 Additionally, the Court finds that there is a “substantial nexus” between the
 7 interests of the class members and the proposed *cy pres* recipients, the Consumer
 8 Federation of America (“CFA”) and New Media Rights (“NMR”), and that a *cy pres*
 9 distribution to these organizations would be consistent with the objectives of the TCPA.
 10 In this lawsuit, Plaintiff and the class members alleged violations of the TCPA, arising
 11 from Defendants’ alleged use of an automated dialer or artificial or prerecorded voice to
 12 contact class members on their cell phones. *See* Settlement Agreement ¶ 1.01. NMR is a
 13 program at Western School of Law that works to advance the privacy rights of consumers
 14 and others through pro bono legal services and education. *See generally* ECF No. 166-3
 15 (“Neill Decl.”). Additionally, NMR helps small businesses and non-profits comply with
 16 privacy laws like the TCPA to protect consumer privacy before violations occur, which
 17 would directly serve the interests of class members. *Id.* at 1–2. CFA is an association of
 18 consumer rights-focused non-profit groups that works to advance the interests of
 19 consumers. *See generally* ECF No. 166-2 (“Weintraub Decl.”). Although CFA’s
 20 mission is broader in scope and not specifically targeted towards privacy and technology,
 21 the organization advocates for the enforcement of the TCPA and similar laws and will
 22 generally further the interests of class members by advancing consumer protection
 23 through research, education, and advocacy. *Id.* ¶¶ 3, 6, 7. CFA operates at the national
 24 level, Weintraub Decl. ¶ 4, and NMR engages in both national and local work, Neill
 25 Decl. at 2–3. As the Settlement Agreement does not specify the geographic location of
 26 the class members, these *cy pres* recipients reflect an appropriate geographic scope. *See*
 27 Settlement Agreement ¶ 2.16.

28 The Court therefore GRANTS Plaintiff’s Motion for *Cy Pres* Distribution from the

1 Residual Settlement Fund.

2 **IV. Conclusion**

3 For the reasons set forth above, the Court hereby:

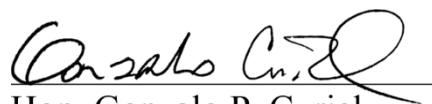
4 1. **GRANTS** Plaintiff's Motion for a Second Distribution to Class Members;

5 2. **GRANTS** Plaintiff's Motion for a *Cy Pres* Distribution from the Residual
6 Settlement Fund to be completed should there be funds remaining following the
7 second distribution, to recipients CFA and NMR; and

8 2. **VACATES** the hearing currently set for April 9, 2021.

9 **IT IS SO ORDERED.**

10 Dated: April 2, 2021


Hon. Gonzalo P. Curiel
United States District Judge